

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

77-2153

To be submitted

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-2153

VINCE D. YANNI,
Petitioner-Appellant,

—v.—

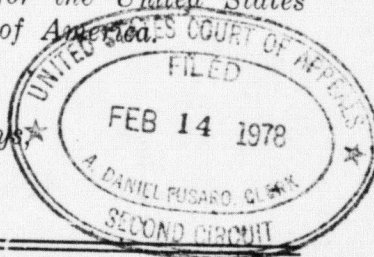
UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF AND APPENDIX FOR THE UNITED STATES
OF AMERICA**

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-2153

VINCENT D. YANNI,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee,

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Vincent D. Yanni appeals from an order entered in the United States District Court for the Southern District of New York, on November 29, 1977, by the Honorable Edward Weinfeld, United States District Judge, denying without a hearing his motion for post-conviction relief, pursuant to Title 28, United States Code, Section 2255.

Indictment 72 Cr. 810, filed on July 12, 1972, charged Yanni and nine others with, *inter alia*, conspiracy to violate the federal narcotics laws, Title 26, United States Code, Sections 4705(a) and 7235(b), and Title 21, United States Code, Section 846. Trial on the indictment commenced on August 21, 1972, before the Honorable Harold R. Tyler, Jr., United States District Judge, and a jury, and concluded on September 19, 1972, when the jury found Yanni guilty on the conspiracy count. On November 3, 1972, Judge Tyler sentenced Yanni to a term of eight

years' imprisonment, and Yanni presently is serving this sentence.

On the direct appeal by Yanni after his trial this Court affirmed the judgment of conviction. *United States v. Manfredi*, 488 F.2d 538 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974).

Four years after his conviction, Yanni filed a motion on September 10, 1976, seeking post-conviction relief on the alleged ground that because of a head injury sustained a decade before trial he was incompetent to stand trial. By order entered October 20, 1976, Judge Weinfeld denied Yanni's motion as "wholly without merit." On appeal from the order, this Court affirmed without opinion. *Yanni v. United States*, No. 77-2004 (2d Cir., April 7, 1977).

Within one month after this Court's decision on Yanni's first Section 2255 motion, Yanni filed a second motion pursuant to Title 28, United States Code, Section 2255 to vacate his conviction and sentence. In this motion, Yanni claimed that he was unconstitutionally denied effective assistance of counsel because of an alleged conflict of interest, in that his attorney also represented at the trial another defendant, Anthony Colangelo. By memorandum-order entered November 29, 1977, Judge Weinfeld denied Yanni's second motion, without a hearing, on the ground that it too was without merit. The present appeal is from the November 29th Order of the District Court.

Statements of Facts

For a full statement of the facts underlying Yanni's conviction, the Government respectfully refers the Court to the panel's opinion in *United States v. Manfredi*, *supra*, 488 F.2d at 590-97. Briefly summarized, the Government's evidence at trial demonstrated "the operation of a large-scale narcotics ring from suburban New York and New

Jersey which supplied dealers and distributors in Harlem." 488 F.2d at 590. Yanni's role was that of a customer of the Manfredi-LaCosa narcotics organization.

1. The Present Motion Pursuant to Section 2255

In this, his second motion made pursuant to Title 28, United States Code, Section 2255, Yanni contended that he was unconstitutionally denied effective assistance of counsel at trial in that the trial judge failed to question Yanni and co-defendant Anthony Colangelo about the possible conflict of interest arising from their joint representation by Lewis Alperin, Esq. Before Judge Weinfeld, Yanni argued that such an inquiry would have established that Yanni's interest was in conflict with that of his co-defendant Colangelo. Specifically, Yanni alleged that he was prejudiced by the joint representation in that his counsel, Lewis Alperin, devoted more time to Colangelo's defense; Yanni was dissuaded from testifying in his own defense by Alperin because counsel feared that Yanni's testimony might have been harmful to Colangelo; and, because Yanni did not take the stand, he was unable to present exculpatory facts to the jury as well as other matters which allegedly would have enhanced his credibility. Yanni's Section 2255 motion originally was not accompanied by any supporting documents. In Yanni's "Traverse to the Government's Answer," defendant exhibited a single page of the suppression hearing and a one paragraph affidavit of co-defendant Colangelo, which recited that "at no time prior to the aforementioned (sic) trial did I discuss the dangers of joint representation with Mr. Lewis Alperin."

2. Pre-Trial Events

Yanni was one of thirteen defendants charged in Indictment 72 Cr. 482 with a conspiracy to distribute narcotics over a two-year period and involving transactions totalling millions of dollars.

The case was originally assigned to the Honorable Edward L. Palmieri. On May 1, 1972, Colangelo pleaded not guilty before Judge Palmieri to the Indictment. At that time, Colangelo was represented by Robert Hufjay, Lewis Alperin's law partner. At the arraignment two other attorneys raised the question of possible conflicts resulting from joint representation of other defendants in the case. Judge Palmieri asked Mr. Hufjay if he had any problems in that respect, and Mr. Hufjay replied that he did not. (Tr. of Proceedings May 1, 1972 at 4).

A week later, on May 8, 1972, Yanni also pleaded not guilty to the Indictment before Judge Palmieri. Yanni was represented by Mr. Alperin, who was accompanied at the arraignment by Mr. Hufjay.

Thereafter, the case was reassigned to Judge Tyler.* At a pre-trial conference before Judge Tyler on June 7, 1972, the Government raised the issue of potential conflicts of interest in that several attorneys were representing more than one defendant. (Tr. of Proceedings June 7, 1972 at 16). The record shows that Mr. Alperin, who was representing both Yanni and Colangelo, was present. Judge Tyler discussed the conflict issue with counsel; however, the issue was left unresolved at that session.

In response to the June 7th colloquy concerning the possibility of a conflict of interest, Mr. Alperin wrote a letter to Judge Tyler on June 15, 1972, in which he informed the District Court that he represented both Yanni and Colangelo and that

"both of my clients have stated that there is no possible connection between them and they know

* Judge Palmieri was to assume senior status as of the summer of 1972.

of no conflict. Therefore, they wish me to continue to represent them." (App. 11a).*

On July 18, 1972, all defendants in the case entered not guilty pleas to superseding indictment 72 Cr. 810.** Following several days of suppression hearings, the case proceeded to trial on August 21, 1972.

3. The Evidence at Trial

The Government proved that Yanni and others, including Colangelo, were distributors of narcotics, each of whom separately relied upon Joseph LaCosa, a key figure in the conspiracy, for their narcotics supply. The principal evidence against Yanni and Colangelo were independent wiretapped conversations that each separately had with LaCosa.***

4. Judge Weinfeld's Opinion

In a thirteen-page opinion denying Yanni's present motion, Judge Weinfeld carefully reviewed the complete trial and suppression record of over 3000 pages of minutes

* A copy of Mr. Alperin's letter appears in the Government's Appendix on this appeal, references to which are cited as "App. ."

** Yanni claimed in his petition that he was unaware that Mr. Alperin also was representing Colangelo until the day the trial began, August 21, 1972. The District Court, in its opinion, noted that this claim was contradicted by the transcript of July 18, 1972, which reflected that Mr. Alperin appeared as attorney for both Yanni and Colangelo and that both defendants were present in court that day. (Tr. of Proceedings July 18, 1972 at 12). Indeed, at this arraignment Mr. Alperin spoke of "my clients," in the plural, making clear the present lack of merit in Yanni's claim. (Tr. at 9).

*** On direct appeal, Yanni did not contest the sufficiency of the evidence against him. 488 F.2d at 593.

and concluded that "the government has demonstrated and the record reflects beyond peradventure that no prejudice occurred" from the fact that Yanni and Colangelo were both represented by the same attorney. (App. 7a).^{*} Accordingly, the District Court determined that no hearing was required on Yanni's motion since, as a matter of law, his petition did not allege a sufficient basis to entitle him to relief.

In rejecting Yanni's claim of ineffective assistance of counsel, Judge Weinfeld first emphasized that Yanni's attorney was not thrust in the role of representing two men with conflicting versions of their participation in the crime charged, because Yanni's and Colangelo's defenses were not inconsistent. From the record, Judge Weinfeld concluded "there is not the slightest basis for petitioner's contention that the defense of one could have implicated the other." (App. 8a).

Second, Judge Weinfeld concluded that there was no evidence—either in the record or in Yanni's petition—that Yanni's attorney persuaded him not to take the stand because his testimony would have damaged Colangelo's defense. Yanni's only support in the 3000 page record for this allegation was a reference to a statement by Alperin, who at one point told Judge Tyler:

"I discussed it, to be frank, placing my client on the stand and I discussed the problems he would have . . ." (Transcript of Suppression Hearing, August 21, 1972, p. 635).

Judge Weinfeld found that Yanni's reliance on this statement was "a distortion of the record," because Alperin's comment, made during the pre-trial suppression hearing, when read in context was no more than a reference to

^{*} Judge Weinfeld's full opinion is reproduced in the Government's Appendix at App. 1a.

the impact of current pre-trial publicity and clearly was not a remark on any difficulty that might arise from one defendant taking the stand. In addition, Judge Weinfeld found "implausible" Yanni's claim that his testimony could have damaged Colangelo's defense and noted that Yanni offered no evidence to support this claim. (App. 8a-9a).

Third, Judge Weinfeld found absolutely no evidence in the record to support Yanni's claim that Alperin was more concerned with Colangelo's defense than Yanni's. Indeed, the District Court determined that Alperin's cross-examination of the witnesses who testified against Yanni was thorough and that Alperin devoted equal attention to Yanni's defense in his opening and closing remarks.* Instead of favoritism for Colangelo, Judge Weinfeld concluded that the record plainly demonstrated "competent and zealous representation of each defendant."

In summary, Judge Weinfeld emphasized:

"beyond peradventure of doubt * * * Yanni's conviction was not influenced in any respect by the fact of joint representation; there is no basis for any claim that Alperin's representation of Colangelo in any way militated against a vigorous and competent defense of petitioner. The Government

* Parenthetically, Judge Weinfeld noted that Alperin took particular interest in Yanni when, during the trial, Yanni experienced several seizures. Alperin brought the matter of Yanni's health to the attention of Judge Tyler. During the colloquy with the court and Government counsel, the question of a mid-trial severance for Yanni was explored, and Alperin personally took Yanni to the doctor for an examination to determine if he was fit to stand trial. (Transcript of Proceedings, at 694-703, 1506-1514). These matters were the basis for Yanni's first section 2255 motion. See, Brief of the United States, *Yanni v. United States*, Dkt. No. 77-2004.

has abundantly established that no prejudice occurred by reason of such representation." (App. 10a).

A R G U M E N T

The District Court Properly Denied Yanni's 2255 Motion Without a Hearing.

On this appeal Yanni renews his much-belated claim that he was entitled to post-conviction relief because Lewis Alperin represented both Yanni and Colangelo at petitioner's trial before Judge Tyler some six years ago. Yanni appears to argue that the mere fact of this joint representation by Alperin presumptively created a prejudicial conflict of interest which, even at this late date, automatically required vacating of his conviction. Contrary to Yanni's position, as Judge Weinfeld correctly noted, under the applicable law there must be some specific and actual prejudice suffered by a defendant before joint representation can be said to have denied him effective assistance of counsel. In the District Court, Judge Weinfeld carefully considered the record of the suppression hearing and trial in Yanni's case and determined beyond any possible doubt that no such prejudice—real or imagined—was suffered by Yanni in this case. Accordingly, the District Court correctly determined that Yanni was not entitled to relief and denied his motion without a hearing.

This Court consistently has adhered to the principle that the mere representation of two or more defendants by one attorney does not automatically give rise to a constitutional deprivation of effective assistance of counsel. Rather, it is well-settled law that "some specific instance of prejudice, some real conflict of interest, some harm from

a joint representation" is required to exist before it can be said that a defendant was denied effective assistance of counsel. *United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976). See also, *United States v. Abraham*, 549 F.2d 236, 239 (2d Cir. 1977); *United States v. Mari*, 526 F.2d 117, 119 (2d Cir. 1975); *United States v. Vowter*, 500 F.2d 1210, 1211 (2d Cir.), cert. denied, 419 U.S. 1069 (1974); *United States v. Wisniewski*, 478 F.2d 274, 281 (2d Cir. 1973); *United States v. Lovano*, 420 F.2d 769, 773 (2d Cir.), cert. denied, 397 U.S. 1071 (1970). This rule applies as well even if the trial judge has failed to make an adequate inquiry at trial into a possible conflict, although since *United States v. Alberti*, 470 F.2d 878, 882 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973), the burden then is on the Government to prove the absence of prejudice.* *United States v. Carrigan*, *supra*.

* In the District Court, Judge Weinfeld found it unnecessary to decide whether *Alberti* should be given retroactive effect, since even after *Alberti* some real and actual prejudice remained a prerequisite to relief. *United States v. Carrigan*, *supra*, 543 F.2d at 1055-56. Judge Weinfeld found that the Government demonstrated, and the record reflected "beyond peradventure," that in this case there was no prejudice from the joint representation.

In view of the soundness of Judge Weinfeld's ruling, this Court need not consider whether the failure to follow the procedures suggested in *Alberti* requires a shifting burden on the issue of prejudice. However, since Yanni appears to press this point on appeal, it is worthy of note that application of a harsher rule on the Government seems particularly unfair in a case like this, where Yanni waited some 6 years after his conviction to claim ineffective assistance and where defendant was sufficiently satisfied with the same retained counsel to continue that representation on direct appeal—matters which simply are inconsistent with the thirteenth hour claims of divided loyalty now leveled against Alperin. Moreover, the question of conflict in this case was thoroughly explored in conformity with the prevailing law at the time the trial commenced. In *United States v. Armone*, 363 F.2d 385 (2d Cir.) cert. denied, 385 U.S. 957 (1966), this

[Footnote continued on following page]

In the present case Judge Weinfeld scrutinized the trial and suppression hearing record, as well as Yanni's allegations of prejudice, and determined that the Government had met its burden beyond any doubt of demonstrating the lack of any actual prejudice suffered by Yanni from the joint representation.

First, it is manifest from the record that Yanni's and Colangelo's defenses were not inconsistent or in any way in conflict with one another. Thus, as Judge Weinfeld noted, Yanni's case did not present the danger that often arises from joint representation when defense counsel is "inevitably thrust in the role of representing two men who had conflicting versions of their participation in the crime charged." *United States v. Carrigan, supra*, 543 F.2d at 1057. Unlike the situations presented in *Carrigan, supra*, *Morgan v. United States*, 396 F.2d 110, 113 (2d Cir. 1968), and *United States v. DeBerry*, 487 F.2d 448, 451 (2d Cir. 1973), Yanni's and Colangelo's defenses in fact were consistent and presented a common theme.

Court stated that the trial judge was entitled to rely on an attorney's representation that he had discussed the question of conflict of interest with his clients and obtained their assurances there were none present. See *United States v. Wisniewski*, 478 F.2d 274, 285 (2d Cir. 1973). In this regard, the record shows that Yanni's attorney wrote to Judge Tyler on June 15, 1972, informing the court that he had discussed with Yanni and Colangelo the possibility of conflicts of interest, that they had stated there was no possible connection between them and knew of no conflict. Further, Alperin reported that each defendant wanted Alperin to continue with the joint representation. Alperin reaffirmed those representations in an affidavit submitted on Yanni's present motion. While Yanni submitted a brief contrary affidavit of Colangelo, the latter surely sounded hollow in light of both defendants ready acceptance of Alperin's joint representation at trial six years ago. In any event Judge Weinfeld was entirely correct in not holding a hearing to resolve this factual dispute since there was no prejudice to Yanni from the joint representation.

The bases of Yanni's and Colangelo's convictions were separate telephone calls with Joseph LaCosa, the principal supplier of narcotics. Five telephone conversations between Yanni and LaCosa were intercepted. Evidence also was offered that LaCosa was seen leaving Yanni's home with a box which the Government contended contained cash received from Yanni for the purchase of heroin. Separately and apart from Yanni, the proof against Colangelo primarily consisted of one wiretapped call placed by an undercover agent who pretended to be a narcotics buyer. The wiretapped conversations between Yanni and LaCosa, concerned the availability of "shirts," which the Government contended was a code word for heroin. *United States v. Manfredi, supra*, 488 F.2d at 594. The wiretapped conversation between Colangelo and LaCosa concerned Colangelo's delivery of "pants" to LaCosa. *Id.* at 595. The Government contended that "pants" was a code word for cocaine.

The thrust of the defenses of Yanni and Colangelo, during cross-examination of Government witnesses and in summation, was that these words were used innocently in their ordinary and every day sense. Counsel for Yanni and Colangelo forcefully attacked the Government's attempt to find illicit transactions in these conversations and further contested the accuracy of the agents' testimony regarding the telephone calls. These defenses, accordingly, fit together comfortably and without tension. Moreover, there was no evidence that Yanni's conversations with LaCosa, or Colangelo's conversation with LaCosa, in any way related to the same or similar transaction. Instead, each transaction which was the subject of an intercepted telephone call was separate and independent. In sum, beside the limited fact that Yanni and Colangelo were each in separate positions of "buyer" from LaCosa, their common source, the two were not directly connected further in the conspiracy and Judge

Weinfeld found no evidence in the entire case that in any respect related Yanni and Colangelo. Alperin, therefore, simply was not in a position where his good faith actions for one client possibly—let alone necessarily—might rebound to the detriment of the other. *United States v. Lovano, supra*, (no prejudice from joint representation since defendants involved in completely different parts of the conspiracy).

Second, it follows from the absence of inconsistent or conflicting defenses that counsel was not presented with the dilemma of one defendant testifying to the harm of the other. At the trial before Judge Tyler neither Yanni nor Colangelo testified in his own behalf and there was never any suggestion that either would testify but for the perceived harm that might be caused to the other. Nevertheless, Yanni now claims that Alperin in fact dissuaded him from testifying because he feared damage to Colangelo's case. Apart from underscoring the wisdom of this Court's observation in *United States v. Wisniewski*, 478 F.2d 274 (2d Cir. 1973) that such a claim from a convicted defendant must be viewed with suspicion, the total absence of merit to Yanni's contention is best demonstrated by the distortion of the record on which he relies. Thus, Yanni seeks refuge in a statement, lifted out of context and beyond comprehension, by Alperin in which reference was made to the problems one defendant might have testifying. (Transcript of Proceedings, August 21, 1972, at 635). Judge Weinfeld properly observed with a full quotation in context of the colloquy,* that Alperin's

* [The Court]: Now, gentleman, over the weekend so far as I know, but I must confess I didn't read the papers that carefully I am sure, but I know of no publicity whatever concerning the publicity that you all brought to my attention at various times last week.

Is there anything about that now that you have to tell me?

[Footnote continued on following page]

remark unquestionably referred to counsel's proper concern that pre-trial publicity relating to the murders of certain relatives of a defendant was likely to have serious impact on defendants' cases; by no rational view did this statement pretend to suggest any possible conflict between Yanni and Colangelo. Indeed, in the face, even now, of Yanni's silence as to any possible substantive way in which his testimony might have jeopardized Colangelo, or further, to what Yanni would have testified, the District Court sensibly found "implausible the suggestion that Yanni's testimony could have damaged Colangelo's defense. . . ."

Finally, in response to Yanni's general claim that his counsel did not devote "equal" time to his defense, the District Court remarked on the overall able representation afforded Yanni by Alperin. Defense counsel forcefully and effectively cross-examined the witnesses against Yanni, persuasively argued his defense, as well as Colangelo's, both in opening and summations, and, attended with

Mr. Bobick: Your Honor, we served subpoenas on—

The Court: We will get to that in a moment. Is there anything else in the papers?

Mr. Alperin: There was a big story about organized crime and what the New York City Police Department is going to do with people mentioning—

The Court: I am talking about this case.

Mr. Alperin: That is my whole point, I discussed it, to be frank, placing my client on the stand and I discussed the problems that he would have—

The Court: Please, I don't want to be privy to any conversations with your client. I am only trying to ascertain was there any article dealing with this case which came out on Friday evening, all day Saturday or all day Sunday?

Mr. Greenberg: Not in specific terms.

personal concern to Yanni's special medical problems which arose at trial.*

Thus, far from the disturbing situation where joint representation invites counsel to compromise his efforts for the sake of one defendant, but to the detriment of the other, the case here simply did not present any such conflicts. The record in this case establishes beyond any doubt that Yanni's conviction was not influenced in any way by the fact that he and Colangelo were represented at trial by the same attorney, and no prejudice occurred by reason of the joint representation. Accordingly, Judge Weinfeld's denial of Yanni's petition as without merit was entirely proper.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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* Judge Weinfeld specifically observed that Alperin actively pursued the matter of Yanni's health, and personally escorted him to physical examinations, all of which matters related to Yanni's competence at trial, a claim he pursued in his first section 2255 motion.

APPENDIX

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Pro Se 77 Civ. 2264

VINCENT YANNI,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

VINCENT YANNI

Pro Se

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This is the second motion made by petitioner Vincent Yanni pursuant to 28 U.S.C., section 2255, to vacate his judgment of conviction which was entered more than five years ago. He was convicted with others of conspiracy to distribute narcotics, which the Court of Appeals in affirming the conviction, described as "a large scale narcotics ring from suburban New York and New Jersey which supplied dealers and distributors in Har-

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lem."¹ He was sentenced by former Judge Harold R. Tyler, Jr. to a term of eight years.

His first motion, made four years after his conviction, was based upon the ground that because of a head injury sustained a decade before trial he was incompetent to stand trial. This Court found, in denying the application, that it was "wholly without merit."² The Court of Appeals affirmed without opinion on April 7, 1977. Within a month thereafter petitioner filed the instant motion. This time he seeks to vacate his conviction on the ground that he was unconstitutionally denied effective assistance of counsel based upon an alleged conflict of interest because his attorney also represented at the trial another defendant, Anthony Colangelo.

After a careful review of the record of over 3000 pages of minutes, from the suppression hearing through the conclusion of the trial, the Court finds that this motion, like the prior one, is without merit and that petitioner's allegations do not require a hearing.

Yanni was one of the thirteen original defendants who were charged with membership in the conspiracy extending over a two-year period and involving transactions totalling millions of dollars. The government's proof established that petitioner and others, including one co-defendant Colangelo, were distributors and relied upon Joseph LaCosa, a major figure in the conspiracy, for their supply of narcotics. Yanni and Colangelo were convicted primarily on the basis of wiretapped conversations that each separately had with LaCosa. In the instance of Yanni, there were five such intercepted calls; evidence

¹ *United States v. Manfredi*, 488 F.2d 588, 590 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974).

² *Yanni v. United States*, 420 F. Supp. 990 (S.D.N.Y. 1976).

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was also offered that LaCosa was seen leaving Yanni's home with a box which the government contended contained cash received from Yanni for the purchase of heroin. In the instance of Colangelo, the proof against him was primarily one wiretapped call and one call placed by an undercover agent pretending to be a narcotics buyer. Neither defendant challenged the identification of his voice.

The government's case against Yanni in large measure rested upon the use of the word "shirts" in the wiretapped conversations, and as against Colangelo it was based upon the use of the word "pants" in his telephone conversation with LaCosa. The government contended that "shirts" was a code word for heroin and "pants" was a code word for cocaine. Neither defendant testified. The thrust of the defense advanced during the cross-examination of government witnesses and in summation was that the words were innocently used in their ordinary sense, whereas the government contended they described illicit transactions. Other than the fact that Yanni and Colangelo made separate telephone calls to LaCosa, who was the principal supplier of narcotics to distributors, no evidence in the entire case in any respect related petitioner and Colangelo.

Petitioner contends that he was denied a constitutionally adequate trial in that Judge Tyler failed to question the defendants concerning their joint representation by Lewis Alperin,³ and that such an inquiry would have es-

³ Yanni also alleges that he was not informed of the joint representation until the day of the trial. This claim is contradicted by the minutes at the July 18, 1972 arraignment on a superseding indictment. At that time, one month prior to the trial, Alperin appeared as attorney for both Colangelo and Yanni, and the transcript indicates that both of his clients were present.

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tablished that Yanni's interests were in conflict with those of his co-defendant Colangelo. Yanni alleges that he was prejudiced by the joint representation as follows: that his counsel, Lewis Alpern, devoted more time to the defense of Colangelo; that he was dissuaded from taking the stand on his own behalf by Alperin because he, according to Yanni, feared that Yanni's "testimony may develop so as to disclose matters which would be harmful to [Colangelo]"; and that because he did not take the stand, he was "unable to present to the jury facts that would tend to exculpate him" or "his 15 year work record and other matters which would have enhanced his credibility. . . ."

The government asserts that Yanni in no respect was prejudiced by Alperin's representation of petitioner and Colangelo. It contends that the evidence demonstrated that the two defendants were involved in different aspects of the conspiracy, that their paths did not cross, and that no evidence was presented at the trial to indicate that they acted together, that they knew one another, or that the participation of each in the conspiracy was such so that joint representation in the slightest degree could produce a conflict of interest. Moreover, the government emphasizes that before the trial it initially, and on its own, raised the issue of possible conflict before the Court, following which Alperin wrote to Judge Tyler, wherein he noted his joint role and stated:

I have advised both of my clients that the United States Attorney has stated that there is a possibility of a conflict unless each defendant has a

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separate lawyer.⁴ Both of my clients have stated that there is no possible connection between them and they know of no conflict. Therefore, they wish me to continue to represent both of them.

Alperin also has submitted an affidavit in the present proceeding wherein he swears that "At the time of writing the letter to Judge Tyler, I reviewed the situation with my clients, and we came to the conclusion that there was no conflict of interest. Up to and including the conclusion of the trial, no factors arose which changed my opinion."

Yanni challenges the veracity of Alperin's statements, alleging that counsel never consulted him concerning the issue of joint representation. He also submits codefendant Colangelo's affidavit that "at no time prior to the aforementioned [sic] trial did I discuss the dangers of joint representation with Mr. Lewis Alperin." Because the Court finds no prejudice from the joint representation, it need not resolve this factual dispute. Moreover, it is significant that petitioner is silent as to what he would have testified to with respect to the basic testimony of his telephone conversations with LaCosa had he not been "dissuaded" from taking the stand, and how any such testimony would have been in conflict with the defense of Colangelo.

The rule in this Circuit is clear that for a court to vacate a conviction on the ground of joint representation,

⁴ The Assistant United States Attorney made the statement referred to by counsel at a pretrial conference before Judge Tyler on June 7, 1972. The Court did not decide the issue at that time. Alperin's letter to the Court quoted in text was written one week after the Assistant brought the matter to the Court's attention.

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the petitioner must demonstrate "some specific instance of prejudice, some real conflict of interest, resulting from a joint representation."⁵ As established by *United States v. Alberti*,⁶ a trial court is required, when confronted with joint representation, to conduct a hearing to determine

whether there exists a conflict of interest with regard to defendant's counsel such that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment. In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views.⁷

If no such inquiry occurred at the time of trial, the government bears the burden of proving no prejudice.⁸ The government here has acknowledged and assumed that burden.

Alberti was decided subsequent to Yanni's conviction. However, this Court need not reach the question of whether *Alberti* should be applied retroactively, as petitioner would have it do. Even after *Alberti* and its

⁵ *United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976) (citing cases).

⁶ 470 F.2d 878, 881-82 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973).

⁷ *Id.* at 882. See *United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976); *United States v. Mari*, 526 F.2d 117, 119 (2d Cir. 1975), *cert. denied*, 429 U.S. 941 (1976); *United States v. DeBerry*, 487 F.2d 448, 425 (2d Cir. 1973).

⁸ *United States v. Carrigan*, 543 F.2d 1053, 1056 (2d Cir. 1976).

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progeny, it is still the rule that the defendant must have been prejudiced by the joint representation.⁹ The Court finds that the government has demonstrated and the record reflects beyond peradventure that no prejudice occurred.

A major danger of joint representation arises when defense counsel is "inevitably thrust in the role of representing two men who had conflicting versions of their participation in the crime charged."¹⁰ This is simply not the case here. The defendant's defenses were not inconsistent. Since the bases of the convictions were separate telephone conversations, defense counsel argued on behalf of each defendant that the references to "shirts" and "pants" were innocent statements concerning wearing apparel. Counsel also questioned the accuracy of the agents' testimony in regard to the telephone calls. Other than the fact that each made separate calls to LaCosa, no evidence in the case related petitioner to Colangelo in any respect. Nor did the calls of one relate to any transaction that the other was negotiating with LaCosa; each transaction was separate and independent. A careful review of the massive record indicates no evidence that linked the two defendants in any way, save for the fact that each separately dealt with LaCosa by telephone.¹¹

⁹ See *United States v. Carrigan*, 543 F.2d 1053, 1055-56 (2d Cir. 1976); *United States v. Vowteras*, 500 F.2d 1210, 1211 (2d Cir.), *cert. denied*, 419 U.S. 1039 (1974); *United States v. DeBerry*, 487 F.2d 448, 452-53 (2d Cir. 1973).

¹⁰ *United States v. Carrigan*, 543 F.2d 1053, 1057 (2d Cir. 1976).

¹¹ The government contends that the defendants were dealing in entirely separate aspects of the conspiracy: Yanni dealt in "shirts"—heroin—and Colangelo in "pants"—cocaine. This contention is not borne out by the record since evidence was presented by Agent Siegel's testimony that he called Colangelo and told him that he (Siegel) had "two shirts to deliver if he [Colangelo] wanted them." T.R. at 1626.

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There is not the slightest basis for petitioner's contention that the defense of one could have implicated the other. Indeed petitioner has not suggested any instance in which a potential conflict existed or could have arisen.

Yanni further alleges that his counsel persuaded him not to take the stand because of the likelihood that Yanni's testimony would have damaged Colangelo's defense. Yanni's only support for this allegation is a reference to the record which indicates that Alperin at one point told the Court: "I discussed it, to be frank, placing my client on the stand and I discussed the problems he would have. . . ." ¹² Yanni claims that this comment demonstrates that he was dissuaded from taking the stand because of the effect that it would have on Colangelo's defense. This is a distortion of the record. The comment by Alperin was made during a suppression hearing prior to the trial when the Court was attempting to determine the impact of current pretrial publicity which referred to the murder of two nephews of a co-defendant, one of whom was also a codefendant with petitioner. The discussion is set out in full in the margin. ¹³ It is clear from

¹² Transcript of the suppression hearing (August 21, 1972) at 635.

¹³ [The Court]: Now, gentlemen, over the weekend so far as I know, but I must confess I didn't read the papers that carefully I am sure, but I know of no publicity whatever concerning the publicity that you all brought to my attention at various times last week.

Is there anything about that now that you have to tell me?

Mr. Bobick: Your Honor, we served subpoenas on—

The Court: We will get to that in a moment. Is there anything else in the papers?

Mr. Alperin: There was a big story about organized crime and what the New York City Police Department is going to do with people mentioning—

The Court: I am talking about this case.

[Footnote continued on following page]

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the context that Alperin was not referring to any difficulty that one defendant taking the stand might place on the other; rather, he was referring to his concern about the prejudicial impact of the recent publicity of the two murders as related to an underworld war for drug business.¹⁴ The Court finds implausible the suggestion that Yanni's testimony could have damaged Colangelo's defense, and petitioner presents the Court with no set of facts to support the claim.¹⁵

Nor does the record support Yanni's allegation that defense counsel did not adequately represent him because he (Alperin) was more concerned with Colangelo's defense. Alperin undertook a thorough cross-examination of the witnesses who testified against Yanni and devoted equal attention to Yanni's defense in his opening and clos-

Mr. Alperin: That is my whole point, I discussed it, to be frank, placing my client on the stand and I discussed the problems that he would have

The Court: Please, I don't want to be privy to any conversations with your client. I am only trying to ascertain was there any article dealing with this case which came out on Friday evening, all day Saturday or all day Sunday?

Mr. Greenberg: Not in specific terms.

¹⁴ See *United States v. Manfredi*, 488 F.2d 583, 603 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974).

¹⁵ The Court is not unaware that the difficult question of whether or not a defendant should take the stand is made far more difficult in a joint representation situation. See *United States v. Carrigan*, 543 F.2d 1053, 1056 (2d Cir. 1976); *Morgan v. United States*, 396 F.2d 110, 114 (2d Cir. 1968). But, as this Circuit has noted:

"[w]hen a trial culminates in a verdict of guilty the temptation is great for a defendant, armed with hindsight, to claim that his lawyer's strategy in not permitting him to run the cross-examination gauntlet was motivated by a conflict of interest. . . . [I]n the absence of objective evidence of corroboratory circumstances, such post-trial claims must be viewed with some suspicion. . . ." *United States v. Wisniewski*, 478 F.2d 274, 284 (2d Cir. 1973).

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ing remarks.¹⁶ Indeed, the record demonstrates that Alperin took particular interest in Yanni: during the trial Yanni experienced several seizures. Alperin personally escorted Yanni to the examining physician's office and actively pursued the matter of Yanni's health thereafter.¹⁷ The record does not support a finding that Alperin favored the defense of Colangelo over Yanni—to the contrary, it demonstrates competent and zealous representation of each. This is not a case, typical in the situation of joint representation, where counsel argues the innocence of one defendant by placing the blame on the other.¹⁸

In sum, petitioner has "done no more than suggest a theoretical conflict of interest and [has] pointed to no specific prejudice" in this case.¹⁹ The Court is persuaded beyond peradventure of doubt that Yanni's conviction was not influenced in any respect by the fact of joint representation; there is no basis for any claim that Alperin's representation of Colangelo in any way militated against a vigorous and competent defense of petitioner. The government has abundantly established that no prejudice occurred by reason of such representation.

The petition is denied.

Dated: New York, N.Y.

November 29, 1977

EDWARD WEINFELD

.....
United States District Judge

¹⁶ See T.R. at 33-37, 2631-50. Alperin did call one witness in Colangelo's defense while he called none on behalf of Yanni. However, this appeared to be a tactical decision rather than any bias on the part of counsel in favor of the defense of Colangelo.

¹⁷ See T.R. at 694-703, 1506-1514.

¹⁸ Cf. *United States v. DeBerry*, 487 F.2d 448, 453 (2d Cir. 1973); *Mone v. Robinson*, 430 F. Supp. 481, 487 (D. Conn. 1977).

¹⁹ *United States v. Lovano*, 420 F.2d 769, 774 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970).

Letter of Lewis E. Alperin, Dated June 15, 1972

Law Offices

ALPERIN AND HUFJAY

*22 West First Street
Mount Vernon, N. Y. 10550*

LEWIS E. ALPERIN

ROBERT A. HUFJAY

Hon. Harold Tyler

June 15, 1972

Judge of U.S. District Court

Southern District

Federal Courthouse

Foley Square

New York, New York 10007

RE: U.S. against Anthony Colangelo
and Vincent Yanni, et al.

72 CR 482

Honorable Sir:

Please be advised that I represent Anthony Colangelo and Vincent Yanni in the above prosecution.

Based upon my investigation conducted so far, I believe both defendants were subjects of Court ordered wire-tapping. Therefore, it is my request that I be entitled to a hearing to test the legality of the wiretapping.

I have advised both of my clients that the United States Attorney has stated that there is a possibility of a conflict unless each defendant has a separate lawyer. Both of my clients have stated that there is no possible connection between them and they know of no conflict. Therefore, they wish me to continue to represent both of them.

I will be available on any date Your Honor sees fit to have a conference or hold a hearing in relation to the wiretaps in this case.

Respectfully yours,

(Signed) LEWIS E. ALPERIN

LEA/ba

New York, N. Y. 10007

(212) RE 2-3050

03M

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Robert B. Mazur, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

OBM That on the 13th day of February, 1978
he served ~~a copy~~ of the within brief by placing the same
in a properly postpaid franked envelope addressed:

VINCENT YANNI
Reg. No. 80452-158
Pembroke Station
Danbury, Ct. 06810

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Robert B. Mazur

Sworn to before me this

13th day of February, 1978

Jeanette Ann Grayeb
JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1976